

BRB No. 00-150

LULA M. SANK)
(Widow of WOODROW W. SANK))
)
Claimant-Petitioner)
)
v.)
)
I.T.O. CORPORATION) DATE ISSUED: Oct. 12, 2000
)
Self-Insured)
Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1527) of Administrative Law Judge Lee J. Romero, Jr., denying death benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant's husband (decedent) worked as a longshoreman from 1963-1982. Claimant alleged that the decedent was exposed to asbestos during his employment as a longshoreman, and that this alleged exposure caused his lung cancer and subsequent death on March 14, 1984. The death certificate states only that the immediate cause of death was oat cell carcinoma of the lung with CNS (central nervous system) metastasis. During his lifetime, the decedent smoked one-half pack of cigarettes per day. He retired in 1982 due to

the effects of chronic obstructive pulmonary disease and degenerative arthritis of the right knee. On February 28, 1996, claimant filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909.

In his Decision and Order, the administrative law judge found that claimant is not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption as she did not establish that decedent was in fact exposed to asbestos in his longshore employment. Assuming, *arguendo*, that claimant established invocation of the Section 20(a) presumption, the administrative law judge found the presumption rebutted based on the opinions of Drs. Bass and Gottlieb. Based on a consideration of the record as a whole, the administrative law judge found that decedent's lung cancer was not due to asbestos exposure. Consequently, the administrative law judge denied claimant the death benefits she sought.

On appeal, claimant contends that the administrative law judge erred in finding that she did not establish invocation of the Section 20(a) presumption and that the opinions of Drs. Bass and Gottlieb are sufficient to establish rebuttal of the Section 20(a) presumption, as they do not rule out the possibility that asbestos exposure contributed to decedent's fatal lung cancer. Employer responds in support of the administrative law judge's denial of benefits.¹ Claimant filed a reply brief reiterating her contentions.

¹Claimant's appeal proceeds only against I.T.O. Corporation although Ryan Walsh, Incorporated and Cooper/T. Smith Stevedoring Company, Incorporated were previously named parties and filed response briefs. By Order dated March 28, 2000, the Board dismissed claimant's appeal of the administrative law judge's decision and remanded the case to the district director for consideration of a settlement agreement with respect to certain of decedent's employers. At that time, claimant was advised of her right to request reinstatement of the appeal against any remaining employers. Claimant subsequently entered into settlement agreements with Ryan Walsh and Cooper/T. Smith, and the district director approved the agreements. *See* Ex. A to Cl. Motion to Reinstate Appeal With Respect to I.T.O. Corporation. On June 30, 2000, the Board reinstated claimant's appeal

against I.T.O. upon her motion. Thus, “employer” in this decision refers only to I.T.O.

Section 20(a) of the Act presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. *See, e.g., American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that decedent's death was not caused or accelerated by his work. *Id.* The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction the instant claim arises, has espoused a "ruling out" standard when addressing the issue of rebuttal of the Section 20(a) presumption.² *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). The Board has recently explained that this standard does not require a physician to rule out all possibilities, as absolute certainties do not exist in the medical profession and such a requirement would raise the standard regarding rebuttal of the presumption to an unreachable level. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). The Board held that an unequivocal opinion, given to a reasonable degree of medical certainty, that the employee's injury is not work-related is sufficient to rebut the Section 20(a) presumption. *Id.*

The administrative law judge found the Section 20(a) presumption rebutted based on the opinions of Drs. Bass and Gottlieb. Based on a review of decedent's medical records and

²The United States Court of Appeals for the Fifth Circuit, however, recently rejected the "ruling out" standard. *See Conoco v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000). The United States Court of Appeals for the First Circuit has stated that the rebuttal standard does not require employer to rule out any possible causal connection between a claimant's employment and his condition as such a requirement goes far beyond the substantial evidence standard stated in the statute. *See Bath Iron Works v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997); *see also Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998).

the depositions of claimant and two of decedent's former co-workers, Messrs. Boggs and King, Dr. Bass stated, in his written report, "Although I cannot completely exclude a small contribution from asbestos exposure, I believe that based on the criteria of reasonable medical probability that Mr. Sank's lung cancer was related to his history of cigarette smoking and not to his history of asbestos exposure." Ryan Walsh Exs. 21, 22; Cooper/T. Smith Exs. 15, 16. Dr. Bass's conclusion was based on his lack of findings suggesting decedent had asbestosis, the location of decedent's tumor in the upper lobe of the lung instead of the lower lobe, and the type of the tumor (small cell) instead of adenocarcinoma, which indicates cigarette smoking as the more important contributor to the development of decedent's cancer than asbestos. *Id.* In his deposition, Dr. Bass acknowledged that he could not absolutely rule out asbestos exposure as a contributing factor to decedent's cancer, but stated, with regard to whether or not decedent's lung cancer was related to his cigarette smoking or asbestos exposure, based upon a reasonable medical probability, that "the evidence that cigarette smoking is related to his lung cancer reaches the level of probability that it is more probable than not. I do not believe that his history of asbestos exposure reaches that level of probability." *See* Ryan Walsh Ex. 24 at 13-15, 53; Cooper/T. Smith Ex. 17 at 13-15, 53.

Dr. Gottlieb, decedent's treating physician for the three months preceding his death stated that, "Mr. Sanks (sic) death was caused by metastatic carcinoma of the lung which was of small cell or oat cell variety. To my knowledge, this type of lung malignancy does not have a predilection for patients with asbestos exposure but is almost always associated with cigarette smoking." *See* Ryan Walsh Ex. 29; Cooper/T. Smith Ex. 18. He also stated that, "with a high degree of medical certainty that the tumor was related to his cigarette smoking and not to asbestos." *Id.* Dr. Gottlieb based his opinion on his treatment of decedent, decedent's medical records, and the depositions of claimant and Messrs. Boggs and King.

After consideration of claimant's arguments on appeal and the administrative law judge's decision in light of the record evidence, we affirm the administrative law judge's denial of death benefits. The administrative law judge properly found that the unequivocal opinions of Drs. Bass and Gottlieb are sufficient to establish rebuttal of the Section 20(a) presumption; thus, we affirm this finding.³ *See Brown*, 893 F.2d at 294, 23 BRBS at 23 (CRT); *O'Kelley*, 34 BRBS at 39; Decision and Order at 19-21; Ryan Walsh Exs. 21, 22, 24 at 13-15, 53, 29; Cooper/T. Smith Exs. 15, 16, 17 at 13-15, 53, 18. Contrary to claimant's contentions, employer need not rule out every theoretical possibility in order to produce

³In light of our affirmance of the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption, we need not address claimant's argument concerning the administrative law judge's finding that she did not establish that decedent was exposed to asbestos.

substantial evidence sufficient to establish rebuttal of the Section 20(a) presumption, and the opinions of Dr. Bass and Gottlieb are based on a reasonable degree of medical certainty, and are not equivocal as to the cause of decedent's death. *See Brown*, 893 F.2d at 294, 23 BRBS at 32 (CRT); *O'Kelley*, 34 BRBS at 39; *see also Prewitt*, 194 F.3d at 684, 33 BRBS at 187 (CRT); *Harford*, 137 F.3d at 673, 32 BRBS at 45 (CRT); *Shorette*, 109 F.3d at 53, 31 BRBS at 19 (CRT). As claimant does not challenge the administrative law judge's weighing of the evidence on the record as a whole, crediting the opinions of Drs. Bass and Gottlieb over that of Dr. Lorino, we affirm the administrative law judge's finding that claimant did not establish the work-relatedness of decedent's death.⁴ Thus, the administrative law judge's denial of death benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order denying death benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁴In support of her claim, claimant submitted Dr. Lorino's opinion which was based on the physician's review of decedent's medical records. Dr. Lorino opined that, "Mr. Sanks' (sic) exposure to asbestos was a major contributing factor to him developing bronchogenic cancer." Cl. Ex. 18. Dr. Lorino also testified at the hearing that based on decedent's employment and medical histories that decedent's asbestos exposure as a longshoreman was a contributing cause of his lung cancer, along with his history of cigarette smoking. Tr. at 76, 85.